SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 239

HARTFORD ACCIDENT & INDEMNITY COMPANY AND ÆTNA CASUALTY & SURETY COMPANY, APPELLANTS,

vs.

N. O. NELSON MANUFACTURING COMPANY, ASSIGNEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1933

[fols. a-1]

IN CHANCERY COURT OF ADAMS COUNTY

C. #5323. B. #—

NATCHEZ INVESTMENT CO., INC., Complainant,

vs.

J. V. & R. T. BURKES et al., Defendants

INTERVENTION, ANSWER, AND CROSS-BILL OF COMPLAINT OF N. O. NELSON MFG. CO., ASSIGNEE OF A. W. MOORE, PROPRIETOR OF AND DOING BUSINESS AS ACME ENGINEERING CO. —Filed Aug. 17, 1929.

To the Honorable Chancery Court of Adams County, Mississippi:

Now comes N. O. Nelson Manufacturing Company, by Brandon & Brandon, its Attorneys, and by leave of this Honorable Court first had and obtained files this its Intervention, Answer and Cross-Bill of Complaint in the above and foregoing styled cause pending in this Honorable Court, and shows unto the Court that said Intervenor is the Assignee of A. W. Moore, Proprietor of and doing business as Acme Engineering Company, named as Defendant in the above and foregoing styled cause, and that it is the legal holder of a promissory note of J. V. Burkes and R. T. Burkes, co-partners under the firm name of J. V. & R. T. Burkes, payable to the order of Acme Engineering Co., and are entitled to all rights and benefits of said Acme Engineering Company under and on the indebtedness mentioned in the Bill of Complaint filed herein as owing by said J. V. & R. T. Burkes herein to the said Acme Engineering Company, A. W. Moore, Proprietor;

And that the said N. O. Nelson Manufacturing Company is a corporation, domiciled in and having its principal place of business in the City of Memphis, State of Tennessee;

[fol. 2] And that said Intervenor now reserving unto itself all manner of benefit and exception to the many errors and inaccuracies contained in the original Bill of Complaint exhibited against the said Acme Engineering Company and

others, for answer unto said Bill of Complaint filed herein, or unto so much or such parts thereof as this Intervenor is advised is material for it to make answer unto, answering says:

I

Intervenor admits that under date of October 18th, 1926, the Complainant, Natchez Investment Company, Inc., entered into a certain agreement or contract with the Defendants, J. V. & R. T. Burkes, of New Orleans, Louisiana, for the construction of a certain building at Natchez, Mississippi, known as Project #640 on the files of Weiss, Dreyfous & Seiferth, Inc., Architects of New Orleans, Louisiana, a copy of which agreement or contract is filed with the original Bill of Complaint filed herein and marked Exhibit "A" thereto, and which Exhibit "A" filed with said original Bill of Complaint is hereby adopted and made a part of this answer and of this Intervenor's Cross-Bill, and is prayed to be taken as a part hereof, the same as if copied herein and the same is hereby made Exhibit "A" to this Answer and this Intervenor's Cross-Bill. Intervenor further admits and on its part specifically charges and avers that said contract and agreement for the construction of said building in Project #640, above mentioned, has as a part thereof certain specifications compiled by Weiss, Dreyfous & Seiferth, Architects and referred to in said contract and made a part thereof, a copy of which said specifications is filed with said original Bill of Complaint and marked Exhibit "B" thereto. And this Intervenor adopts and makes a part of this Answer and its Cross-Bill said copy of said specifications, filed as Exhibit "B" to the original Bill of Complaint, and specifi- [fol. 3] cally charges and avers on its part that said specifications were a part of said contract and on its part adopts the said Exhibit "B" to the original Bill of Complaint as Exhibit "B" to this answer and this Intervenor's Cross Bill and makes the same a part of this Answer and Cross-Bill as fully as if the same were copied herein.

II

Said Intervenor further admits that said specifications contain one hundred and twenty-six (126) numbered pages, numbered from #1 to #126 inclusive, and also contained three pages preceding page #1, and are all bound

in a binder marked "Plans #640—Specifications for the Eola Hotel, a seven-story Fire Proof Building to be erected in Natchez, Mississippi," and that of said specifications on pages #18 and #19 thereof appeared the following clauses:

"Article 30

It shall be the obligation of every contractor and sub-contractor estimating upon work under this contract operation to figure and to include within his bid to furnish a bond in the sum and conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the Owner or Architects; contractor likewise to pay the cost of any required recordation of contract and bond and the cost of any required cancellation of the same. He shall also secure and pay for lien and privilege certificate which will be required of him before final payment is made under this contract.

The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the Owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi, and shall [fol. 4] provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary.

Guarantee: It is the intent of the Architects to secure first class, permanent material and construction, and to this end each contractor will be held responsible for and must rectify all defects discovered in his work within one year after completion of the entire structure and its acceptance by the Architect. Should any material or workmanship called for by these specifications, be of such a nature as to render this guarantee impossible, notice of this effect must be served in writing upon the Architects previous to the signature of contractor; failure to do so will be construed as tacit agreement to the strictest terms of this guarantee.

Obligations of Bondsmen: The contractor's bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contracts covering the work executed hereunder, and the Owner and the Architects reserve the right to make all desirable changes, alterations

and additions, under the conditions and in the manner hereinbefore described, without in any measure affecting the liability of the bondsmen or releasing them from any of their obligations hereunder. The Owner and the Architect reserve the right to make such changes, alterations, and additions in the manner specified without notice to the contractor's surety, and waiver of such notice shall not affect the validity of the bond.

The sureties for the various contractors shall be, and are hereby declared and acknowledge themselves to be bound to the Owner as guarantors, separately and in solido with the contractors of the fulfilment of the terms of the foregoing."

[fol. 5] And this Intervenor on its part specifically charges that said specifications include the foregoing alleged and quoted clauses.

III

This Intervenor further admits and on its part specifically charges and avers that on October 20th, 1926, said J. V. & R. T. Burkes, in compliance with said contract and the foregoing quoted provisions of the contract and specifications to furnish a bond to secure the Owner the faithful performance of the contract, did furnish such bond with the Hartford Accident and Indemnity Company of Hartford, Connecticut, as surety thereon, and the copy of said bond filed as Exhibit "C" to said original Bill of Complaint and made a part thereof is by this Intervenor alleged to be a copy of such bond and the same is now made a part of this Intervenor's Answer and Cross-Bill, and made Exhibit "C" hereto, as fully as if copied herein, and said Intervenor further admits, charges and avers that said bond, among other provisions contained therein, made the said contract, Exhibit "A" and specifications, Exhibit "B", parts of said bond; and that said bond incorporated said contract and specifications in the terms, stipulations and conditions of said bond; and that said bond contains, among other clauses, the following:

"Whereas, the Principal and the Obligee have entered into a certain written contract (hereinafter called the contract) dated October 18th, 1926, to construct "Eola Hotel" building as per plans and specifications #640 as prepared

by Weiss, Dreyfous & Seiferth, Architects, New Orleans, Louisiana, a copy of which is or may be attached hereto and is hereby referred to and made a part hereof."

IV

Intervenor admits and charges and avers that the said J. V. & R. T. Burkes proceeded to construct the said Eola [fol. 6] Hotel Building under said contract and specifications and admits that the Natchez Investment Company accepted said Hotel Building on or about the 10th day of August, 1927, but avers that it is not acquainted with the terms of the agreement under which the construction of said Hotel Building was accepted, but avers that any such acceptance was conditional, only; and neither admits nor denies that such an agreement was made upon the acceptance of said Building, as is alleged in paragraph #4 of the original Bill of Complaint, but demands strict proof of the terms of such agreement, both on the part of said Complainant and of J. V. & R. T. Burkes, Defendants in the original Bill of Complaint.

[fol. 7] Cross-bill

And this Intervenor having made full answer to the Bill of Complaint filed herein makes its Answer a Cross-Bill, reiterating and recharging all the averments in said Answer contained, for causes of complaint by way of Cross-Bill herein against said Complainant and all parties to said suit, and for Cross Bill of Complaint Cross-Complainant respectfully shows unto the Court the following, to-wit:

(1)

That Cross-Complainant is a corporation, domiciled and having its principal place of business in the City of Memphis and State of Tennessee, and at all times mentioned herein one A. W. Moore, was proprietor of and conducted a plumbing business under the name of Acme Engineering Company with its principal office and place of business in the City of Memphis and State of Tennessee, and the names and addresses of the Cross-Defendants to this Cross-Bill of Complain' are, as follows:

Natchez Investment Company, a corporation under the Laws of the State of Louisiana, qualified and doing busi-

ness in the State of Mississippi and having its principal place of business at Natchez, Mississippi; J. V. Burkes and R. T. Burkes, composing the partnership of J. V. & R. T. Burkes, of New Orleans, Louisiana, whose postoffice address is New Orleans Bank Building, New Orleans, Louisiana; J. V. Bartlette, Trustee in Bankruptcy for the Bankrupt partnership of J. V. & R. T. Burkes and Trustee for the indiyiduals in bankruptcy, appointed by the United States District Court for the Eastern District of Louisiana, for Cause #3355 on the Docket of Edward J. Thilborger, Referee in Bankruptcy, New Orleans, Louisiana, said Trustee's postoffice address being New Orleans Credit Men's Association, New Orleans, Louisiana; Hartford Accident & Indemnity Company of Hartford, Connecticut, [fol. 8] whose postoffice address in Hartford, Connecticut; R. Lee Parker, Jr., of Natchez, Mississippi; R. Scudamore, of Natchez, Mississippi; Natchez Brick Company, a partnership composed of R. Lee Parker, Jr., and R. Hicks Parker, both of Natchez, Mississippi; Williamson-Greer, a partnership composed of Walter Williamson and A. A. Greer, both of Dallas, Texas; The R. C. Lieb Company of Atlanta, Georgia; New Orleans Bank & Trust Company, of New Orleans, Louisiana; Feltus Bros. Hardware Company, of Natchez, Mississippi; Enochs Lumber & Mfg. Company, a corporation of Jackson, Mississippi, domiciled at Jackson, Mississippi; the Capitol Paint & Glass Company, a corporation domiciled at Jackson, Mississippi; the Southern C. F. Co., Inc., of Atlanta, Georgia; Chamberlain Metal Weather Strip Company, a corporation of St. Louis, Missouri; Hockaday, Inc., of Chicago, Illinois; National Show Case Company, of Columbus, Georgia; O. L. Bunn, doing business as Bunn Electric Company of New Orleans, Louisiaia; Gibbons & Gordon, Inc., of New Orleans, Louisiana; Woodward-Wight Company, Ltd., of New Orleans, Louisiana; Schultz Cabinet Works, of New Orleans, Louisiana; Natchez Drug Company of Natchez, Mississippi; Truscon Steel Company, of Youngstown, Ohio; Geisenberger Bros. Drug Company of Natchez, Mississippi; M. P. Phelan, of Natchez, Mississippi; and St. Bernard Cypress Co. Ltd., of Arabi, Louisiana.

(2)

That under date of October 18th, 1926, said Defendants, J. V. & R. T. Burkes, entered into a certain contract and

agreement in writing with the Cross-Defendant, Natchez Investment Co., Inc. for the construction of said Eola Hotel Building at Natchez, Mississippi, as alleged in said Bill of Complaint and the Answer of this Cross-Complainant as Intervenor in this cause, which contract was designated and known as Project #640 on the files of Weiss, Drey-
[fol. 9] fous & Seiferth, Inc., Architects, at New Orleans, Louisiana, the copy of which said contract has been filed with the original Bill of Complaint in this cause and has been made a part thereof, together with the specifications compiled by the Architects and referred to in said Contract and all of same have been made Exhibits to this Cross-Complainant's Answer and are now made Exhibits to this Cross-Complainant's Cross Bill of Complaint, and are adopted and made a part hereof as fully as if copied herein.

(3)

That in compliance with the terms of said Contract and said Specifications, said defendants, J. V. & R. T. Burkes, entered into a Bond in favor of said Cross-Defendant, Natchez Investment Company, Inc., in the sum of Three Hundred and Sixteen Thousand Eight Hundred and Twenty-two and no/100 ($316,822.00) Dollars to secure said Natchez Investment Company, Inc., the faithful performance of said contract, with the Hartford Accident & Indemnity Company of Hartford, Connecticut, as Surety thereon—the said Natchez Investment Company, Inc., being the owner of the property upon which said hotel building was to be erected and being the owner of said proposed hotel building. A copy of said bond having been filed as an Exhibit to the original Bill of Complaint herein and adopted as a part of and made an Exhibit to this Cross-Complainant's Answer, is hereby adopted and made a part of this Cross-Bill of Complaint and is made an Exhibit to this Cross-Bill of Complaint. That as alleged in said Answer and as now charged in this Cross-Bill of Complaint, said Contract and Specifications were made a part of said Bond and the terms and conditions of said Contract and Specifications are incorporated in said Bond so far as they affect the interest of this Cross-Complainant the same as though
[fol. 10] fully written therein, and that said Bond consisted of the Bond, said Contract and said Specifications, and also

of Chapter 128 of the Laws of Mississippi of 1918; and that said Bond was entered into by the parties thereto in contemplation of said Chapter 128 of the Laws of Mississippi, 1918, and is such a bond as is mentioned in Section #3, of said Statute, and is a bond guaranteeing the faithful performance of said Contract.

(4)

That said Defendants, J. V. & R. T. Burkes, under their said contract and agreement with the Cross-Complainant, Natchez Investment Company, Inc., and under the terms and stipulations and conditions of the specifications made a part of said contract, and the bond with the Hartford Accident & Indemnity Company, as Surety, in compliance therewith, proceeded to construct said Eola Hotel Building, and Cross-Complainant charges that said hotel building was constructed by said Defendants but that same has never been accepted by the Natchez Investment Company, Inc., and that full settlement has not been made by the said Natchez Investment Company, Inc., to and with the said J. V. & R. T. Burkes, Contractors.

(5)-A

That on the 18th day of October, 1926, the said Defendants, J. V. & R. T. Burkes, General Contractors, for the construction of said Eola Hotel Building and the said Acme Engineering Co. by A. W. Moore made and entered into a certain contract in writing whereby it was contracted and agreed by and between the parties that the said Acme Engineering Co., as Sub-contractor under the said J. V. & R. T. Burkes, should furnish all labor and material and install the plumbing, heating and ventilating system in and about the erection and construction of the Eola Hotel Building at Natchez, Mississippi, as in said contract provided [fol. 11] and particularly specified; and that for said labor and materials furnished in doing such work and for the total consideration of said contract, the said J. V. & R. T. Burkes therein and thereby promised to pay to the said Acme Engineering Co. the total sum and consideration of Forty-six Thousand Five Hundred Forty-nine and 88/100 ($46,549.88) Dollars. The contract so made and entered into in writing by the parties was a formal and binding obligation upon each and in accordance with the terms and

conditions therein specified; and that the said A. W. Moore, Proprietor of Acme Engineering Co., was thereby bound and obligated, to do and perform the work and furnish the labor, materials and supplies necessary for the completion of the work therein specified to be done, and that thereby the said Burkes were bound and obligated to pay in accordance with the terms and conditions therein provided to the said A. W. Moore for such work, labor, materials and supplies said total consideration of $46,549.88; that a copy of said contract in writing between the said Acme Engineering Co. and the said J. V. & R. T. Burkes is filed herewith as Exhibit "F" to this Cross-Bill and the same is made a part hereof for all intents and purposes as fully as if copied herein, and is hereby sued upon; and reference is hereby made to the specifications for construction of said hotel building already filed herewith and hereinabove referred to for the specifications of the work contracted to be done by the said A. W. Moore, Proprietor of Acme Engineering Co., under said Contract. That the said A. W. Moore, Proprietor of Acme Engineering Co., completed and performed on his part all his obligations under said contract and did and performed all the work, furnished all the labor, materials and supplies necessary for the completion of the work provided to be done and performed in said contract and performed all of same within the time provided and re-
[fol. 12] quired by said contract; but that the said Defendants, J. V. & R. T. Burkes, have failed on their part to pay unto the said A. W. Moore, Proprietor of Acme Engineering Co., the full consideration due and owing by them unto him in accordance with the terms and provisions of said Contract; and that there remains due and owing by the said J. V. & R. T. Burkes a balance on account of the consideration provided to be paid in said contract of the total principal sum of Five Thousand Nine Hundred Seventeen and 53/100 ($5,917.53) Dollars, together with interest at the rate of six and one-half per cent per annum from August 17th, 1927, as hereinafter more particularly shown; and that demand has been made upon the said Defendants, J. V. & R. T. Burkes, to pay said sum of money due and owing by them as aforesaid to your Intervenor; but that though said sum is long since past due and owing and should have been paid, said Defendants, J. V. & R. T. Burkes, to do have wholly failed and refused and still fail

and refuse, and Intervenor and Cross-Complainant charges and avers that the balance of the principal sum of Five Thousand Nine Hundred Seventeen and 53/100 ($5,917.53) Dollars and interest and attorney's fees, as hereinbefore shown, is due and owing by the said J. V. & R. T. Burkes and by the Hartford Accident & Indemnity Company as Surety on the Bond aforesaid; and Cross-Complainant further shows and avers that all work, labor, materials and supplies so furnished under said contract by the said A. W. Moore, Proprietor of Acme Engineering Co., were used by the said J. V. & R. T. Burkes in the erection and construction of said Eola Hotel Building and are now incorporated therein.

(5)-B

That after the said A. W. Moore, Proprietor of Acme Engineering Co., had on his part fulfilled and completed his [fol. 13] said sub-contract and agreement, hereinabove mentioned, the said J. V. & R. T. Burkes, to evidence and provide for the payment of the said balance due and owing thereon, at New Orleans, Louisiana, on June 17th, 1927, made, executed and delivered unto the said A. W. Moore, Proprietor of Acme Engineering Co., their joint and several promissory note of that date, payable August 17, 1927, to the order of the said Acme Engineering Co. in said principal sum of $5,917.53 the same bearing interest at the rate of six and one-half per cent per annum from maturity until paid, and providing on its face that in the event default is made in the payment of said note at maturity and is placed in the hands of an attorney for collection, or suit is brought on the same, then an additional amount of twenty per cent on the principal and interest of said note shall be added to the same as collection fees, therein agreed upon as liquidated damages and to further secure the payment of said note and indebtedness, the said J. V. & R. T. Burkes attached thereto and pledged and delivered to the said A. W. Moore thirty-five and one-half (35½) shares of the Corporate Capital Stock, being Certificate #6, of the Commercial National Bank of Hattiesburg, Mississippi. A copy of said promissory note is hereunto annexed and attached as Exhibit "G" hereto and made a part hereof for all purposes as fully as if copied herein and the original thereof will be offered in evidence at the hearing of this cause.

(5)-C

That the said A. W. Moore, Proprietor of said Acme Engineering Co., for value received, and for valuable considerations and before the maturity of said note, sold, assigned, transferred and delivered said note, together with the collateral security therewith pledged and thereunto attached and his said claim, together with all security apper- [fol. 14] taining to the same, unto your Cross-Complainant, the said N. O. Nelson Manufacturing Company, and that the said N. O. Nelson Manufacturing Company is now the legal holder and owner of said note in due course and is the legal owner and holder of said claim against the said J. V. & R. T. Burkes, Natchez Investment Company, Inc., Hartford Accident & Indemnity Company and all parties affected by said claim for the balance due and owing as aforesaid under said Sub-contract and is entitled to all the rights and remedies for the enforcement and collection of said claim and note which were had or held by the said A. W. Moore and to all rights, liens, privileges and securities unto the same in anywise appertaining or belonging.

(6)

That on the 17th day of August, 1929, Cross-Complainant gave notice to the said Natchez Investment Company, Inc., and others, in conformith with Chapter 128 of the Laws of Mississippi of 1918 that the said A. W. Moore had furnished said materials and labor and done and performed the work provided to be done and performed and furnished under said Sub-contract and that the amount due therefor was unpaid and that your Cross-Complainant was the Assignee of said claim and entitled to all rights and benefits thereunder, a copy of which said notice so given is hereunto attached and annexed and made Exhibit "D" to this Cross-Bill of Complaint.

(7)

Cross-Complainant further charges and avers that the Bond executed by the Defendants, J. V. & R. T. Burkes with the Hartford Accident & Indemnity Company as Surety thereon was given in compliance as hereinabove alleged [fol. 15] with the Contract and specifications for the construction of said Eola Hotel Building and in compliance

and in conformity with Chapter 128 of the Laws of Mississippi of 1918. That under the terms and conditions of said contract, specifications and bond hereinabove mentioned and under the Laws of the State of Mississippi said Defendants, J. V. & R. T. Burkes became obligated to promptly pay to said A. W. Moore, proprietor of Acme Engineering Co., the amount due him for said materials and labor furnished in and above the erection and construction of said Eola Hotel Building under said Sub-contract; and upon default in the payment thereof, the said Defendants J. V. & R. T. Burkes, and the Defendant, Hartford Accident & Indemnity Company, became then and there obligated under said bond to pay to the said A. W. Moore all sums due and unpaid to him by the said J. V. & R. T. Burkes for labor and materials furnished in and about the erection and construction of said Eola Hotel Building. Cross-Complainant further charges that default has been made by the said J. V. & R. T. Burkes in payment to the said Moore and unto your Cross-Complainant as Assignee of the said A. W. Moore for said materials furnished as hereinabove alleged to the principal sum and amount of $5,917.53 and interest and attorney's fees, for the payment of which the Defendant, Hartford Accident & Indemnity Company, is bound, obligated and liable to your Cross-Complainant as the Assignee of the said A. W. Moore; and that there is now due, owing and unpaid to your Cross-Complainant by the Defendant, Hartford Accident & Indemnity Company the said principal sum of $5,917.53, with interest thereon at the rate of six and one-half per cent per annum from August 17th, 1927, and twenty per cent on said total principal and interest as attorney's fees for which Cross-Complainant is entitled to a judgment and decree.

[fol. 16] (18)

The Premises Considered, Cross-Complainant prays that all parties made defendant to this Cross-Bill of Complaint be summoned and cited by proper process of this honorable Court to be and appear at the September Rules, 1929, thereof, then and there to answer or demur to this Cross-Bill of Complaint, answer under oath being waived and dispersed with, and that upon the hearing of this cause, the Court will grant unto Cross-Complainant personal judgment and decree against the Defendant, J. V. & R. T.

Burkes, and the Trustee in Bankruptcy, and the Defendant, Hartford Accident & Indemnity Company, in the full principal sum and amount of Five Thousand Nine Hundred Seventeen and 53/100 ($5,917.53) Dollars, and interest as hereinabove alleged to be due, and twenty per cent thereon attorney's fees in this cause by it incurred; and that this honorable Court will render a Decree against the Natchez Investment Company, Inc., in favor of said Cross-Complainant for its proportionate share of the amount remaining owning by said Natchez Investment Company, Inc., to said J. V. & R. T. Burkes on account of the building contract hereinabove set forth, and, to this extent, declare and establish a lien in favor of Cross-Complainant against and upon said Eola Hotel Building and premises and all funds in the hands of said Natchez Investment Company, Inc., owing to said J. V. & R. T. Burkes, and a first prior lien against the Eola Hotel building as being prior in right to the mortgages and deeds of trust of record hereinabove recited and mentioned.

[fol. 17] IN CHANCERY COURT OF ADAMS COUNTY

ANSWER OF HARTFORD ACCIDENT & INDEMNITY CO.

8

This defendant admits that Section 2, Chapter 128 of the Laws of 1918 contains a provision alleged in paragraph 8 of the bill and says that the assignment made by J. V. and R. T. Burkes to the New Orleans Bank and Trust Company is subordinate to the rights and claims of subcontractors and materialmen and further says that said Section 2 is unconstitutional and void as will be hereinafter shown.

9

This defendant denies, answering paragraph nine, that the complainant is entitled to bring this suit against it and the contractors and denies that it has a right to bring in all subcontractors and materialmen having claims for material and labor furnished in the building of the Eola Hotel and says that the bond issued by it was not a bond for the faithful performance of the contract but simply a bond of indemnity.

* * * * * * * *

This defendant denies that the parties named in the original bill as furnishing material in connection with said project have not been paid and says that they are not entitled to recover from this defendant for the same even if not paid.

Further answering the bill of complaint this defendant says that neither the original complainant or any other person is entitled to recover from it because it says that its bond is not a performance bond within the meaning of Chapter 128 of the Laws of 1918 nor does its bond guarantee the faithful performance of the contract by J. V. & R. T. Burkes but that said bond is a pure bond of indemnity, running solely in favor of the Natchez Investment [fol. 18] Company, Inc., who can not sue on it until they have actually paid out money as a result of the default of the contractors.

Further answering the bill of complaint this defendant says that to construe said bond as coming with Chapter 128 of the Laws of 1918 is to render that law invalid and void because it is an unwarranted interference with the freedom of contract as against the owner of property, contractors and sureties and that such a construction violates Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Further answering said bill this defendant says that Section 2 of Chapter 128 of the Laws of 1918 is unconstitutional and violative of the Fourteenth Amendment to the Constitution of the United States, Section 1 thereof, in that it is an unwarranted interference with the freedom of contract of the contractor.

Further answering said bill this defendant says that Chapter 128 of the Laws of 1918 is invalid and void and unconstitutional—

A. Because it is not within the power of the Legislature of the State of Mississippi to create a contract between parties sui juris.

B. Because said Statute constitutes the taking of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section Fourteen of the Constitution of the State of Mississippi.

C. Because said law attempts to make a contract between persons without their consent and to give a class of third persons rights without the consent of the original parties to the contract.

[fol. 19] D. Because said law denies to the contractor and his surety the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

E. Because it is not within the police power of the state even under the Federal Constitution to pass such an act as Chapter 128 of the Laws of 1918.

Further answering the original bill this defendant says that the bond executed by it, in paragraph 1 of the conditions, provided:

"The Obligee, shall, at the times and in the manner specified in the contract, fully comply with all the terms thereof and if the Obligee default in the performance of any matter or thing agreed or required in this bond, or in the contract, the Surety shall thereupon be relieved of all liability hereunder."

And this defendant says that this condition of the bond was breached by the obligee, the Natchez Investment Company, Inc., in this, to-wit: That it did not pay the contractors in cash according to the terms of the contract nor did it furnish in cash, as was required by the contract, the additional sums over and above the first mortgage bond issue which additional sums complainant well knew were necessary to the full completion of the job and this defendant alleges that the complainant fraudulently entered into a conspiracy with J. V. & R. T. Burkes and with the architects on this job to deceive the Canal Bank and Trust Company Trustee under the first mortgage bond issue and all persons dealing with complainant and with J. V. & R. T. Burkes by giving to the said Contractors notes and other obligations in lieu of cash and by taking from the said con-
[fol. 20] tractors receipts showing the payment of monies, which in fact had not been paid and by causing false certificates to be made to the Canal Bank and Trust Company, Trustee, as to the amount of money which complainant had actually delivered to the architect and or the contractors for use in erection of the hotel and further says that by

reason of these acts the bond has been violated and voided, not only as to complainant but as to the materialmen and other persons holding claims against the said contractors.

[fol. 21] In Chancery Court of Adams County

[Title omitted]

Answer of the Hartford Accident and Indemnity Company to the Intervention of N. O. Nelson Manufacturing Company, Assignee of A. W. Moore, Trading as Acme Engineering Company—Filed July 8, 1932

Now comes the Hartford Accident & Indemnity Company and for answer to the petition of intervention and cross bill of the N. O. Nelson Manufacturing Company, assignee of A. W. Moore, trading as Acme Engineering Company says:

This defendant adopts as its answer to said intervention and cross bill of N. O. Nelson Manufacturing Company its answer to the original bill of complaint heretofore filed in this cause.

Further answering this defendant says that the bond sued on provides that there shall be no right of action in favor of any one save the named obligee to-wit, Natchez Investment Company, Inc., and that to permit the N. O. Nelson Manufacturing Company to sue on said bond, contrary to the provisions of said bond, violates the freedom of contract guaranteed to this defendant and all other persons by Section 1 of the Fourteenth Amendment to the Con-
[fol. 22] stitution of the United States.

Further answering this defendant denies the right of intervenor, N. O. Nelson Manufacturing Company, to intervene and recover in this cause because it says that said intervenor took certain collateral, to-wit, thirty-five and one-half shares of the capital stock of the Commercial National Bank of Hattiesburg, Mississippi, evidenced by stock certificate No. 6 of said Bank and that notwithstanding it had the right to do so said intervenor did not enforce the collection of said collateral by proper foreclosure thereof and permitted the collateral to go unrealized upon up to the time the Commercial National Bank of Hattiesburg, Mississippi, failed.

This defendant says that at the time of the maturity of the note of A. W. Moore to N. O. Nelson Manufacturing Company the said thirty-five and one-half shares of stock had a market value of more than $100.00 per share and this defendant shows that the note of J. V. and R. T. Burkes to the Acme Engineering Company and assigned by Acme Engineering Company to N. O. Nelson Manufacturing Company was due August 17, 1927, and that the Commercial National Bank of Hattiesburg, Mississippi, did not close its doors until the — day of ——, 1931, and this defendant says that said intervenor should be charged with the value of the above security at its market value as of August 17, 1927.

This defendant further denies that the material and labor sued for by N. O. Nelson Manufacturing Company went into the erection and construction of the Eola Hotel and denies that J. V. and R. T. Burkes or this defendant owe the sum of $5,917.53 to either the Acme Engineering Company or to N. O. Nelson Manufacturing Company and denies that it owes to either any part of said sum.

[fol. 23] And now having fully answered this defendant prays to be dismissed with its costs.

Wells, Jones, Wells and Lipscomb, Attorneys for Hartford Accident & Indemnity Company.

[File endorsement omitted.]

[fol. 24] In Chancery Court of Adams County

[Title omitted]

Agreed Statement of Facts Between Hartford Accident & Indemnity Company and N. O. Nelson Mfg. Co.—Filed Aug. 8, 1932

The following facts are admitted to be correct on the part of N. O. Nelson Mfg. Co., through its Attorneys, Brandon & Brandon, and the Hartford Accident & Indemnity Company, through its attorney, L. Barrett Jones, in that certain cause styled Natchez Investment Company, Inc., vs. J. V. & R. T. Burkes, et al., Defendants, numbered #5323 on the General Docket of the Chancery Court of

Adams County, Mississippi, and this Agreement may be filed in said cause as an evidentiary matter, and the parties hereto agree to be bound by this Agreement when the same is so filed in said cause as to the facts set forth and covered herein, together with the necessary conclusion deducible from said facts herein stated.

That, under date of October 18th, 1926, the Natchez Investment Company, Inc., entered into a certain agreement or contract with the Defendants, J. V. & R. T. Burkes, of New Orleans, Louisiana, for the construction of a certain building at Natchez, Mississippi, known as Project #640 on the files of Weiss, Dreyfous & Seiferth, Inc., Architects, [fol. 25] of New Orleans, Louisiana, as per copy of which agreement or contract was filed with the original Bill of Complaint filed herein and marked Exhibit "A" thereto, and that same may be offered in evidence without further identification or verification; and that the Natchez Investment Company, Inc., was a corporation, incorporated under the Laws of the State of Louisiana and was such at all times mentioned in the pleadings in this cause, and that the said J. V. & R. T. Burkes was a co-partnership composed of J. V. Burkes and R. T. Burkes, doing a general building contractors business, residents of New Orleans, Louisiana, and that the Hartford Accident & Indemnity Company is a surety company doing a general surety business in the State of Mississippi in said State and under the Laws of said State and was so qualified at all times mentioned in the pleadings filed in this case.

That the said Contract and Agreement for the construction of said building, which was the Eola Hotel Building, at Natchez, Mississippi, was project #640, as above mentioned, had as a part thereof certain Specifications compiled by Weiss, Dreyfous & Seiferth, Inc., Architects, and referred to in said Contract and made a part thereof, and that the copy of said Specifications filed with the original Bill of Complaint herein and marked Exhibit "B" thereto is correct, and that same may be offered in evidence without further identification or verification.

That on the 20th day of October, 1926, said J. V. & R. T. Burkes, in compliance with said contract and specifications, furnished the Bond mentioned in the original Bill of Complaint, and as shown by copy thereof filed as Exhibit "C" to said original Bill of Complaint and that said copy so

filed as Exhibit is correct and same may be offered in evidence without further identification or verification; and that the Hartford Accident & Indemnity Company was the [fol. 26] Surety on said Bond for a valuable consideration as a paid surety, and on said date executed the same as Surety. That, thereafter, said J. V. & R. T. Burkes, Contractors, proceeded to construct the said Eola Hotel Building under said Contract and Specifications, and that said building was conditionally accepted by said Natchez Investment Company, Inc., on or about the 10th day of August, 1927; that the Natchez Investment Company, Inc., was the owner of the property upon which said hotel building was erected and was the owner of same at the time this cause and suit was instituted.

That on the 18th day of October, 1926, the said Defendants, J. V. & R. T. Burkes, General Contractors, for the construction of said Eola Hotel Building, and the said Acme Engineering Co. by A. W. Moore made and entered into a certain contract in writing whereby it was contracted and agreed by and between the parties that the said Acme Engineering Co., as Sub-contractor under the said J. V. & R. T. Burkes, should furnish all labor and material and install the plumbing, heating and ventilating system in and about the erection and construction of the Eola Hotel Building, at Natchez, Mississippi, as in said contract provided and particularly specified; and that for said labor and materials furnished in doing such work and for the total consideration of said contract, the said J. V. & R. T. Burkes therein and thereby promised to pay to the said Acme Engineering Co. the total sum and consideration of Forty Six Thousand Five Hundred Forty nine and 88/100 ($46,549.88) Dollars. The contract so made and entered into in writing by the parties was a formal and binding obligation upon each and in accordance with the terms and conditions therein specified; and that the said A. W. Moore, Proprietor of Acme Engineering Co., was thereby bound and obligated to do and [fol. 27] perform the work and furnish the labor, material and supplies necessary for the completion of the work therein specified to be done, and that thereby the said Burkes were bound and obligated to pay in accordance with the terms and conditions therein provided to the said A. W. Moore for such work, labor, materials and supplies said total consideration of $46,549.88; that a copy of said con-

tract in writing between said Acme Engineering Co. and said J. V. & R. T. Burkes was filed with the Intervention and Cross-Bill of N. O. Nelson Mfg. Co. as Exhibit "F" thereto and that same is true and correct and may be offered in evidence without further identification or verification. That said A. W. Moore, Proprietor of the Acme Engineering Co., completed and performed on his part all his obligations under said Contract and did and performed all the work and furnished all the labor, materials and supplies necessary for the completion of the work provided to be done and performed in said contract, and performed all of said — within the time provided and required by said contract; but that said J. V. & R. T. Burkes, Defendants, failed on their part to pay unto said A. W. Moore, Proprietor of Acme Engineering Co.; the full consideration due and owing by them unto him in accordance with the terms and provisions of said contract; and that there remains due and owing by the said J. V. & R. T. Burkes a balance on account of the consideration provided to be paid in said contract of a total principal sum of Five Thousand Nine Hundred Seventeen and 53/100 ($5,917.53) Dollars; together with interest thereon as sued for herein by the Cross-Complainant N. O. Nelson Mfg. Co. from August 17th, 1927; and that the said J. V. & R. T. Burkes are now indebted unto the said N. O. Nelson Mfg. Co. for said balance with interest; and that the prices and sums and the [fol. 28] total consideration for said contract, work, labor, and material are just, fair, and reasonable and at prices and sums agreed to by and between said J. V. & R. T. Burkes and said A. W. Moore, Proprietor of Acme Engineering Co.; and further that all such labor, material, and work alleged in the Cross-Bill of Complaint to have been so sold and furnished were received by and used by the said J. V. & R. T. Burkes in the erection and construction of said Eola Hotel Building under said Project #640, and that all such labor and materials are now incorporated in said Eola Hotel Building.

That after the said A. W. Moore, Proprietor of Acme Engineering Co., had on his part fulfilled and completed his said sub-contract and agreement, hereinabove mentioned, the said J. V. & R. T. Burkes, to evidence and provide for the payment of the balance due and owing thereon, at New Orleans, Louisiana, on June 17th, 1927, made, executed, and

delivered unto said A. W. Moore, Proprietor of Acme Engineering Co., their joint and several promissory note of that date payable August 17th, 1927, to the order of said Acme Engineering Co., in said principal sum of $5,917.53, and to further secure the payment of said note and indebtedness, the said J. V. & R. T. Burkes attached thereto and pledged and delivered to the said A. W. Moore thirty five and one-half (35½) shares of the Corporate Capital Stock, being Certificate #6, of the Commercial National Bank, of Hattiesburg, Mississippi; that a copy of said Promissory Note is attached to the Cross-Bill of Complaint filed herein as Exhibit "G" thereto, and that the same is a true and correct copy and may be offered in evidence without further identification or verification.

That the said A. W. Moore, Proprietor of said Acme Engineering Co., thereafter, for value received and for valuable consideration, and before the maturity of said note, [fol. 29] sold, assigned, transferred, and delivered said note, together with the collateral security therewith pledged and thereunto attached and his said claim against said J. V. & R. T. Burkes, together with all securities appertaining to the same, unto said N. O. Nelson Mfg. Co., the Cross-Complainant under this Agreement, and that the said N. O. Nelson Mfg. Co. is now the legal holder ond owner of said note in due course and is the legal owner and holder of said claim against J. V. & R. T. Burkes, the Natchez Investment Company, Inc., the Hartford Accident & Indemnity Company, and all parties affected by said claim for the balance due and owing as aforesaid under said sub-contract and is entitled to all the rights and remedies for the enforcement and collection of said claim and note which were had or held by the said A. W. Moore and to all rights, liens, privileges, and securities unto the same in anywise appertaining or belonging.

That the said N. O. Nelson Mfg. Co. had made due demand upon the said J. V. & R. T. Burkes and upon the said Hartford Accident & Indemnity Company for payment of the aforesaid demanded sum, payment of which has been refused by the said J. V. & R. T. Burkes and said Hartford Accident & Indemnity Company.

That on the 17th day of August, 1929, said N. O. Nelson Mfg. Co. gave notice to the Natchez Investment Company, Inc., and others, the owner of the Eola Hotel Building and

the property upon which same is situated, in strict conformity with Chapter 128 of the Laws of the State of Mississippi of 1918, that said A. W. Moore had furnished said materials and labor and done and performed the work provided to be done and performed and furnished under said sub-contract, and that the amount due therefor was unpaid, and that the said N. O. Nelson Mfg. Co. was the Assignee of [fol. 30] said claim and entitled to all rights and benefits thereunder; and that the said N. O. Nelson Mfg. Co. fully complied with the provisions of Chapter 128 of the Laws of Mississippi of 1918 for the giving of notice to the owner of the amount owing for materials used in the construction of said Eola Hotel Building.

That this cause was originally brought and instituted by the Natchez Investment Company, Inc., as Complainant against J. V. & R. T. Burkes, Hartford Accident & Indemnity Company, and various and sundry sub-contractors and materialmen, for the purpose, amongst other things, of requiring and having all subcontractors and materialmen and their assignees to appear in said cause and to assert and establish all liens and claims they might have for labor; work, and materials furnished in and about the erection and construction of said Eola Hotel Building in Natchez, Adams County, Mississippi; that, though the said A. W. Moore, as Proprietor of Acme Engineering Company, was named as a Party Defendant in said cause and was cited to appear therein as one of such sub-contractors, yet at the time said cause was instituted, said Moore had already parted with his interest in said note, claim and demand, and had also been adjudged a bankrupt in the Federal District Court of Tennessee; that the said N. O. Nelson Mfg. Co. was not named as a party in said cause and had not notice or knowledge of the pendency of the same until about the first day of August, 1929, when it was informed thereof and immediately filed its Petition for leave to intervene herein.

That the said J. V. & R. T. Burkes knew that the said N. O. Nelson Mfg. Co. was the Assignee of said Moore, as hereinabove set forth, and that it was the owner and holder in due course of said note; but that said J. V. & R. T. Burkes informed said N. O. Nelson Mfg. Co. of the fact of the [fol. 31] pendency of this cause; that at the time that said N. O. Nelson Mfg. Co. filed its Cross-Bill of Complaint and Intervention herein final settlement of said Contract has not been made or paid.

That if it should finally be held in this cause by the Court that the Bond hereinabove referred to as having been executed by the Hartford Accident & Indemnity Company as Surety on the terms and conditions as shown by the pleadings in this cause, was and is a Bond guaranteeing the faithful performance on the part of said J. V. & R. T. Burkes, Contractors, of their contract for the construction of said Eola Hotel Building, under said Project #640, as alleged by the pleadings in this cause, and same is still in force and that same is available to this claimant, then that said N. O. Nelson Mfg. Co. is *not* entitled to a Judgment against said Hartford Accident & Indemnity Company for the full amount herein sued for and demanded, as hereinabove agreed and as alleged in the Cross Bill of Complaint filed by said N. O. Nelson Mfg. Co.; but said Hartford Accident & Indemnity Company does not agree that it is additionally liable for attorney's fees to said N. O. Nelson Mfg. Co., but the question of liability for attorneys' fees is left to the Court as a matter of legal construction under said contract documents and bond; however, it is agreed that said N. O. Nelson Mfg. Co. has been required to come into this proceeding as assignee of A. W. Moore, doing business as Acme Engineering Co. for the enforcement and protection of its rights, and that it has been necessary for it to employ attorneys, to-wit: Brandon & Brandon, of Natchez, Mississippi, and that it has thereby incurred reasonable attorneys' fees for the services required and to be required for [fol. 32] the prosecution of its claim to final judgment; and that such proceedings have become necessary by reason of the failure of the Contractors, J. V. & R. T. Burkes, to pay the amount of their indebtedness to said N. O. Nelson Mfg. Co.

Nothing herein contained shall in anywise be taken as an agreement by the Hartford Accident & Indemnity Company that this is a concursus proceeding or a proceeding in anywise akin thereto, or that it was made necessary by the Hartford Accident & Indemnity Company, or that the Bond herein given by it was a Bond guaranteeing the faithful performance of the contract, or that its Bond is still in force, or that such Bond is available to this sub-contractor; but such matters are left to the Court for determination as a matter of legal construction on the proof, pleadings, contract documents, exhibits, bond, and law. It is further

Agreed that the said N. O. Nelson Mfg. Co. still has in its possession the said 35½ shares of the corporate capital stock of the Commercial National Bank of Hattiesburg, Mississippi, and that it has not to this date sold the same or disposed thereof; that said stock is tendered into Court for such disposition as the Court may direct.

That prior to the original institution of this suit by the Natchez Investment Company, but subsequent to the maturity of said promissory note, the said J. V. & R. T. Burkes had filed a voluntary Petition for adjudication as Bankrupts in the United States District Court at New Orleans, Louisiana; and that thereafter and thereupon the said N. O. Nelson Mfg. Co. asserted its lien and claim as pledged to said 35½ shares of the corporate capital stock of said bank, and said stock was on May 7, 1929 surrendered by the Trustee in Bankruptcy for J. V. & R. T. Burkes to said N. O. Nelson Mfg. Co., as being an asset of said J. V. [fol. 33] & R. T. Burkes in which there was no equity for other creditors. That, thereafter, and promptly upon said stock having been so surrendered to the said N. O. Nelson Mfg. Co., said N. O. Nelson diligently endeavored to dispose of said stock which it held as collateral for a fair price and toward the reduction of the indebtedness evidenced by said promissory note; but that there was no open market for said stock and said N. O. Nelson Mfg. Co. was unable to find a purchaser thereof for a fair consideration or to dispose of the same.

It is further Agreed that the entire record in the Chancery Court heretofore made in this cause, together with the Record in the Mississippi State Supreme Court in this Cause No. 5323, shall be considered a part of the record in this cause involving the Intervention claim and Cross-Bill of N. O. Nelson Mfg. Co., Assignee of A. W. Moore, etc., and that all evidence and testimony heretofore introduced in this cause No. 5323 shall be considered as evidence in this particular controversy on this particular claim as fully as if same had been formally offered and introduced herein.

It is further Agreed that all opinions rendered in the Supreme Court of the State of Mississippi in this cause on appeals shall be considered a part of this record for all purposes.

It is further Agreed that the setting down of this cause on the pleadings herein at this time shall not be taken under

the rule as an admission in and of itself that the averments in the answers are confessed or taken as evidence, the Respondent Hartford Accident and Indemnity Company waiving the right to have andy delay for the taking of depositions.

This the 8th day of August, A. D. 1932.

[fol. 34] Hartford Accident & Indemnity Co., by L. Barrett Jones. N. O. Nelson Mfg. Co., by G. H. Brandon.

[File endorsement omitted.]

[fol. 35] In Chancery Court of Adams County

C.#5323. B.#176

Natchez Investment Company, Inc., Complainant,

vs.

J. V. & R. T. Burkes and Hartford Accident & Indemnity Company et als, Defendants,

In the Matter of the Intervention, Answer, and Cross-bill of Complaint of N. O. Nelson Mfg. Co., Assignee of A. W. Moore, Doing Business as Acme Engineering Company

Decree—Filed Aug. 8, 1932

This cause coming for hearing on the Bill of Complaint filed herein and all pleadings filed herein, and on oral testimony and depositions and agreed statement of Facts as filed herein, and the Court having duly considered all the evidence and the record in this cause and being now fully advised in the premises doth Order, Adjudge, and Decree that the Bond herein sued on, executed by J. V. & R. T. Burkes as Principal and Hartford Accident & Indemnity Company, as Surety, by virtue of the Contract Documents and under the Law of the State of Mississippi, is a Bond guaranteeing the faithful performance of the contract for the erection and construction of the Eola Hotel Building in Natchez, Adams County, Mississippi, being Project No. 640 [fol. 36] on the files of Weiss, Dreyfous & Seiferth, Inc., Architects, of New Orleans, Louisiana, and that said Bond

now and at all times mentioned herein was and is still in full force and effect and that the Surety on said Bond, Hartford Accident & Indemnity Company of Hartford, Connecticut, is by this Court decreed to be liable on said Bond for the payment of the respective sums hereinafter set forth and decreed to be due and owing to N. O. Nelson Mfg. Co., as hereinafter set forth, and *and* that said J. V. & R. T. Burkes, as Principal, and Hartford Accident & Indemnity Company, jointly and severally, are liable in said sums to the said N. O. Nelson Mfg. Co., as Assignee of A. W. Moore, doing business as Acme Engineering Company.

It is further Ordered, Adjudged, and Decreed that the said Hartford Accident & Indemnity Company and said J. V. & R. T. Burkes are jointly and severally liable to said N. O. Nelson Mfg. Co. for interest on the amount sued for and demanded by the said N. O. Nelson Mfg. Co. in the sum and amount set forth hereinafter as for interest, and that such interest item has been calculated to the date of this Decree, and that said principal sum of indebtedness, with said added interest, and the total thereof, shall bear interest from and after this the date of this Decree at six (6%) per cent. per annum.

It is thereupon further Ordered, Adjudged, and Decreed that the said Intervenor and Cross-Complainant, N. O. Nelson Mfg. Co., as Assignee of A. W. Moore, doing business as Acme Engineering Co., do have and recover of, from, and against said J. V. Burkes, & R. T. Burkes and Hartford Accident and Indemnity Company, jointly and severally, Judgment for the principal of their claim and demand in the sum of Five Thousand Nine Hundred and Seventeen and 53/100 ($5,917.53) Dollars, and for interest [fol. 37] thereon to this date in the sum of One Thousand Seven Hundred and Sixty-six and 37/100 ($1,766.37) Dollars, total of Judgment here rendered, Seven Thousand, Six Hundred and Eighty-three and 90/100 ($7,683.90) Dollars; and it is further Ordered, Adjudged, and Decreed that the total of said Judgment hereinabove awarded shall bear interest at six (6%) per cent per annum from this date until paid, and that all costs accrued in this cause to be taxed be paid by said J. V. Burkes and said R. T. Burkes, and said Hartford Accident & Indemnity Company, for which let execution issue.

It is further Ordered, Adjudged, and Decreed that the said N. O. Nelson Mfg. Co., as Assignee of A. W. Moore, do further have and recover Judgment of, from, and against said J. V. Burkes and R. T. Burkes, jointly and severally, as for Attorney's fees incurred in this cause in the sum and amount of One Thousand Five Hundred and Thirty-six and 78/100 ($1,536.78) Dollars, together with interest thereon at the rate of 6% per annum from this date until paid—for which let execution issue.

It is further Ordered, Adjudged, and Decreed that all issues involved in this cause not determined heretofore or by this Decree, be and the same are hereby continued for hearing and determination at the January Term, 1932, of the Chancery Court of Adams County, Mississippi.

The Hartford Accident & Indemnity Company excepts to this Decree.

Any parties to the litigation interested in this Decree may have their appeal as provided by law.

Ordered, Adjudged, and Decreed in Term time at Natchez, Adams County, Mississippi, on this the 8th day of August, A. D. 1932.

R. W. Cutrer, Chancellor.

[fol. 38] [File endorsement omitted.]

[fol. 39] IN SUPREME COURT OF MISSISSIPPI, DIVISION A

No. 30507

HARTFORD ACCIDENT & INDEMNITY COMPANY

vs.

N. O. NELSON MANUFACTURING COMPANY

OPINION—Filed May 1, 1933

(Not to be Reported in the State Reports)

COOK, J.:

This is the fourth time that some branch of this cause has been before this court. On the first appeal the cause was styled Hartford Accident & Indemnity Company vs. Nat-

chez Investment Company, Inc., et al., and the opinion of the court is reported in 155 Miss. 31, 119 So. 366. On the second appeal, under the same style, the opinion is reported in 161 Miss. 198, 132 So. 535, while the opinion of the court in overruling the suggestion of error therein is reported in 161 Miss. 222, 135 So. 497. The third appeal was in the particular branch of this cause which is now before the court, and the opinion on that appeal is reported in 160 Miss. 504, 135 So. 349. The questions raised by the present appeal are all settled by the prior decisions in this cause, which are the law of this case.

The decree of the court below was in accord with these prior decisions, and it will therefore be affirmed.

Affirmed.

[File endorsement omitted.]

[fols. 40-42] IN SUPREME COURT OF MISSISSIPPI

No. 30507

HARTFORD ACCIDENT & INDEMNITY COMPANY

vs.

N. O. NELSON MFG. CO., Assignee

DECREE—May 1, 1933

This cause having been submitted at a former day of this term on the record herein from the Chancery Court of Adams County and this court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 8th day of August, 1932, be and the same is hereby affirmed. It is further ordered, adjudged and decreed that the appellee do have and recover of and from appellant, Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company, surety on the supersedeas appeal bond herein, the sum of $7,683.90 the amount of the decree in the court below together with the further sum of $384.19 being damages at the rate of 5 per centum as allowed by

statute, also interest on the amount of said decree from the date of its rendition in the court below until paid at the rate of 6 per centum per annum, and all of the costs of this court and in the court below to be taxed, etc.

[fol. 43] [File endorsement omitted]

IN SUPREME COURT OF MISSISSIPPI

No. 30507

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 1, 1933

Said Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company, in connection with their petition for the allowance of an appeal in said case present this their assignment of errors and say that the decision, judgment and decree of the Supreme Court of Mississippi, rendered in said case is erroneous and unjust to the appellants in the following respects:

1

That the Supreme Court of Mississippi erred in holding and deciding that the statute of Mississippi, approved March 28, 1918, known and designated as Chapter 128, Laws of Mississippi of 1918, (Hemingway's Code (1927) of Mississippi, Sections 2596 to 2603, both inclusive) upon which the decision against said Hartford Accident & Indemnity Company is based and upon which liability against it is predicated is not invalid as being repugnant to the Constitution of the United States, as being a law of said State which deprives persons upon whom it operates of liberty and property without due process of law.

2

That the Supreme Court of Mississippi erred in holding [fol. 44] and deciding that Section 3 of said Statute of the State of Mississippi, as construed and applied by the Supreme Court of Mississippi, in its decision and judgment in this suit, is not repugnant to the Fourteenth Amendment

to the Constitution of the United States, and, therefore, void in that it deprives the appellant of property and a property right without due process of law.

3

That the Supreme Court of Mississippi erred in holding and deciding that said statute of the State of Mississippi, and particularly Section 3 thereof, is not repugnant to the Fourteenth Amendment to the Constitution of the United States as depriving the appellant, Hartford Accident & Indemnity Company and the landowner, Natchez Investment Company, Inc., of a property right, to-wit; the liberty of contract, without due process of law. To make this assignment of error more specific it is pointed out that the Supreme Court of Mississippi construed and applied said statute in this case, where the said appellant, as surety, entered into a bond with the said landowner, as obligee, providing that if said surety's principal, who was a contractor for the erection of a building for said landowner, 'shall indemnify the obligee against loss or damage directly caused by the failure of the principal faithfully to perform the contract' the bond should be void and the bond further provided that it should not 'apply to nor cover guarantees * * * for the furnishing of any bond' under the contract between the 'landowner and the contractor', and the bond further provided that 'no right of action shall accrue upon or by reason hereof to or for the use and benefit of any one other than the obligee named therein,' by a holding that under said statute said bond was also subject to the additional obligation prescribed by said statute 'that such contractor shall promptly make payments to all persons furnishing labor or materials under said contract' and that the bond would [fol. 45] inure to the benefit of material men and that breaches of its conditions by the obligor would not be a defense by the surety against the claims of said material men. It is further pointed out that the Supreme Court of Mississippi thus construed and applied said statute with the effect of making it deprive said appellant and said landowner of the liberty of contracting for the indemnifying of said landowner against loss or damage directly caused by the failure of the contractor to perform the contract without also giving material men, furnishing materials to the contractor, a right of action in the bond for the value of

their materials furnished, despite the contractual provisions of the bond to the contrary.

4

Because the Supreme Court of Mississippi erred in affirming the judgment of the Chancellor sitting in the Chancery Court of Adams County, Mississippi, in overruling the demurrer of the Hartford Accident & Indemnity Company to the original bill in said cause; and particularly the second, fourth, fifth, sixth, eighth and ninth grounds of said demurrer which assert the repugnancy of said statute to the constitution of the United States.

5

Because the Supreme Court of Mississippi erred in affirming the judgment and decree of the Chancellor sitting in said suit in the Chancery Court of Adams County, Mississippi, and in rendering judgment and decree in favor of material men and against said appellant, Hartford Accident & Indemnity Company on said bond.

6

That the Supreme Court of Mississippi erred in holding and deciding that said statute of the State of Mississippi [fol. 46] which, as construed by the Supreme Court of Mississippi, deprived the appellant, as surety on a bond, of the liberty of contracting that its liability as surety should extend only to the indemnification of the obligee (a landowner, having private work done for him), against loss or damage directly caused by the failure of the contractor faithfully to perform the contract and that no other person should have a right of action in the bond, is not void for its repugnance to the Fourteenth Amendment to the Constitution of the United States.

7

That the Supreme Court of Mississippi erred in holding and deciding that the Legislature of Mississippi had the power to enact said statute under the police power of said State.

8

That the Supreme Court of Mississippi erred in affirming the decree of the Chancery Court of Adams County, Mis-

sissippi, in favor of appellee because of the constitutional grounds set up in the other assignments of error.

W. Calvin Wells, L. Barrett Jones, Attorneys for Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company.

[fol. 47] [File endorsement omitted]

IN SUPREME COURT OF MISSISSIPPI

No. 30507

[Title omitted]

ORDER GRANTING APPEAL—Filed June 1, 1933

On this the 1st day of June, 1933, the Hartford Accident & Indemnity Company and the Ætna Casualty & Surety Company, having presented their petition for the allowance of an appeal in the suit in the Supreme Court of Mississippi, in which the Hartford Accident & Indemnity Company is the appellant, Ætna Casualty & Surety Company is its surety on said appeal, and the N. O. Nelson Manufacturing Company, Assignee, is the appellee, in which final judgment was, in said court, rendered against said appellant, Hartford Accident & Indemnity Company and said surety, Ætna Casualty & Surety Company, on May 1, 1933, in order to appeal said suit to the Supreme Court of the United States and to obtain a supersedeas of the final judgment or decree in said suit:

The petition is granted and the appeal is allowed and this shall operate as a supersedeas of the judgment or decree in said suit upon said Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company giving, within the time provided by law, a bond in the sum of Ten Thousand and No/100 Dollars, payable to the adverse par- [fols. 48–59] ties jointly and severally, conditioned that the said Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company shall prosecute their appeal to effect and answer all damages and costs if they fail to make good their plea.

Sydney Smith, Chief Justice of the Supreme Court of Mississippi.

[fol. 60] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF APPELLANTS IN COMPLIANCE WITH PARAGRAPH 9, RULE 13 OF THE COURT—Filed July 14, 1933

Now comes the Hartford Accident & Indemnity Company and the Ætna Casualty & Surety Company, Appellants in the above stylec cause and file their statement of points on which they intend to rely and the part of the record which they think necessary for the consideration thereof, to-wit:

1

The appellants rely on the point that the liberty of contract as to private business is a right protected by the Fourteenth Amendment to the Constitution of the United States and that a statute of the State which arbitrarily denies or materially abridges this right is unconstitutional and void and that Chapter 128 of the Laws of Mississippi of 1918, being Sections 2274 to 2881, both inclusive, Mississippi Code of 1930, the statute involved in this case, is condemned under this principle.

2

Appellants rely on the point that the third section of said Chapter 128 of the Laws of Mississippi of 1918, which [fol. 61] reads:

"When any contractor or subcontractor entering into any contract with any person, firm or corporation for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation, guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties may insert therein, such bond shall also be subject to the additional obligation that such contractor or sub-contractor shall promptly make payment to all persons furnishing labor or materials under said contract,"

is null and void as being in violation of the Fourteenth Amendment to the Constitution of the United States in that:

A. It denies to the appellants the liberty of contract.

B. In that it denies to appellants the equal protection of the law.

C. In that it denies to appellants the due process of law.

3

Appellants rely on the point that Section 3 of Chapter 128 of the Laws of Mississippi of 1918, as construed by the Supreme Court of the State of Mississippi in this case is violative of the Fourteenth Amendment to the Constitution of the United States by reason of said court construction, independently of the unconstitutionality of said section as written, in that said construction by said Supreme Court of Mississippi denies to appellants:

A. The liberty of contract.

B. The equal protection of law.

[fol. 62] C. The due process of law.

4

The point is made that the construction placed upon the bond written in this case by the Hartford Accident & Indemnity Company, said bond having been construed in the light of Section 3, Chapter 128 of the Laws of Mississippi of 1918, has the effect of depriving the appellant, Hartford Accident & Indemnity Company of:

A. The liberty of contract.

B. The equal protection of law.

C. The due process of law.

All in violation of the Fourteenth Amendment to the Constitution of the United States.

5

The point is relied on that it is not within the police power of the State of Mississippi to enact such a chapter as Chapter 128 of the Laws of Mississippi of 1918 and particularly Section 3 of said Act.

6

The point is relied on that it is not within the power of a legislature to make a contract between persons without

their consent or to give third persons rights in a contract without the consent of the contracting parties and that said legislative attempt, on the part of the State of Mississippi, through Section 3, Chapter 128 of the Laws of Mississippi of 1918 is for that reason violative of the Fourteenth Amendment to the Constitution of the United States.

Appellants designate as the parts of the record to be considered in connection with the above points the following:

[fol. 63] 1. The transcript of record in Cause No. 333, October Term 1931 of this Court, which by reference has been made a part of the transcript in this cause, with the exception of the following pages found in the above record, to-wit:

a. Pages 42 to 45, both inclusive.

b. The decree of the Chancery Court of Adams County, commencing at page 57 and ending on page 66, not here necessary.

c. The judgment of the Supreme Court of Mississippi, found at pages 74 to 83, both inclusive, and not here necessary.

d. Pages 91 to 104, not here necessary.

2. Appellants further designate as necessary to the consideration of this cause the answer of the Hartford Accident & Indemnity Company as set out at pages 58 to 61, both inclusive, of the transcript of this cause.

3. The answer of the Hartford Accident & Indemnity Company to the intervention of the N. O. Nelson Manufacturing Company, pages 62 to 64, both inclusive, of the transcript.

4. The agreed statement of facts, pages 65 to 75, both inclusive, of this transcript.

5. The decree of the Chancery Court of Adams County, Mississippi, pages 76 to 79 of this transcript.

6. The opinion of the Supreme Court of Mississippi in the instant case, page 80 of the transcript.

7. Decree of the Supreme Court of Mississippi, page 81 of this transcript.

8. Intervention, answer and cross bill of the appellee, pages 82 to 87, both inclusive, of this transcript.

9. The cross bill shown at pages 88 to 96 of this transcript.

[fols. 64 & 65] 10. The portion of the prayer of the cross bill shown at page 97 of this record.

Respectfully submitted.

W. Calvin Wells, L. Barrett Jones, Attorneys for Appellants.

I, Gerard H. Brandon, Attorney of record for appellee in the above case, do hereby acknowledge service upon me of a true copy of the above statement of points and designation of record filed on behalf of the appellants in the above styled cause.

Witness my signature, this the 11th day of July, 1933.

Gerard H. Brandon, Attorney for Appellee.

[fol. 66] [File endorsement omitted.]

[fol. 67] In Supreme Court of the United States

Designation by Appellee of Additional Parts of the Record for Consideration—Filed July 19, 1933

Now comes N. O. Nelson Mfg. Co., Appellee, in the above styled cause, and, in compliance with Paragraph 9, Rule 13, of this Court, designates additional portions of the Record which it thinks necessary for a consideration of the appeal and particularly for a consideration of the Appellee's Statement of Matters making against the Jurisdiction of this Court and for a consideration of its Motion to Dismiss or Affirm and Brief in support thereof, and said Appellee designates the following additional portions of the Record, to-wit:

Appellee designates as a part of the Record to be considered in connection with this appeal and its said Motion:

1. The entire transcript of Record in Cause No. 333, October Term, 1931, of this Court, which by Præcipe of the Appellant has been made a part of the transcript in this cause, it being unnecessary because of agreement of the parties hereto to reprint any portion of said Record.

2. The Opinion, Judgment, and Mandate of the Supreme Court of the United States rendered in Cause No. 333, October Term, 1931, same being a portion of the Record in said

Case No. 333, October Term, 1931, and therefore by agreement of parties not necessary to be reprinted.

Respectfully submitted.

Gerard Brandon, O. I. O., Gerard H. Brandon.

Service of the foregoing Designation of Additional Portions of the Record is hereby acknowledged this July 15th 1933.

W. Calvin Wells, L. Barrett Jones, Counsel for Appellants.

[fol. 68] [File endorsement omitted.]

Endorsed on cover: File No. 37,842. Mississippi Supreme Court. Term No. 239. Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company, appellants, vs. N. O. Nelson Manufacturing Company, assignee. Filed July 3, 1933. File No. 239, O. T. 1933.